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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

NO. 75-6297

Supreme Court, U. S.
FILED
JUN 1 1976
MICHAEL RODAK, JR., CLERK

RAMON MARTIN FIALLO, An infant by his Mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, and RAMON AUGUSTO RAFAEL FIALLO-SONE; CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER, An infant by his father, CLEOPHUS RUPERT WARNER; TREVOR ASTON WILSON and EARL ANTONIO WILSON, Infants by their aunt and next friend, LENA HUDSON, and ARTHUR CECIL WILSON, on behalf of themselves and all other persons similarly situated,

Appellants,

- against -

EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD E. CHAPMAN, Jr., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE KILEY, individually and as District Director of the Immigration and Naturalization Service for New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; LEONARD WALENTYNOWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. HURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF IN OPPOSITION
TO APPELLEES' MOTION TO AFFIRM

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OCTOBER TERM, 1975

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v.

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TO APPELLEES' MOTION TO AFFIRM

The Government's motion to affirm the judgment below in this case should be denied, and this appeal should be given plenary consideration by this Court upon full briefing and oral argument by the parties. A summary affirmance of this case will inevitably be interpreted as conclusively holding that the courts are totally powerless to review the constitutionality of <u>any</u> Congressional enactment which relates to the admission of aliens, no matter how extreme and egregious be the discrimination which is enacted. This case demonstrates the total unacceptability of that view. At least in the unique circumstances of this case, the Courts must have the power to invalidate patently unconstitutional immigration statutes relating to the admission of aliens where, as here, there is involved: (1) primarily the statutory

and constitutional rights not of aliens but of United States citizens and permanent residents; (2) not an absolute exclusion of an entire group of aliens, but rather disparate treatment between individuals within a particular group of admissible aliens; (3) considerations which are fully susceptible to judicial resolution; and (4) a classification which affects procedural as well as substantive constitutional rights and discriminates doubly on grounds of sex and illegitimacy which have repeatedly been condemned by this Court. Because of the unique coalescing of these factors in the context of the instant case, the reversal of the judgment below does not require this Court to reconsider, much less overrule, the cases cited by the Government which have discussed the assertedly broad power of Congress to legislate in this area of immigration law.

The statutes challenged herein were designed primarily to secure certain statutory rights for United States citizens and legal permanent residents. The statutory benefit enjoyed by the alien is wholly dependent upon and derivative from the citizen or permanent resident relative.[1] In Almeida-Sanchez v. United States, 413 U.S. 266,272 (1973) and United States v. Brignoni-Ponce, 422 U.S. 873 (1975), this Court explicitly held that where the constitutional rights of United States citizens are at stake, "no Act of Congress can authorize a violation of the Constitution,"

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[1] Thus, if the challenged statutes were declared unconstitutional appellant Serge Warner, a minor alien, would not have a right to enter this country unless his father Cleophus Warner, a U.S. citizen, affirmatively exercised his right to petition for Serge's entry.

even in the field of immigration law. In contrast, the cases cited by the Government did not primarily concern the rights of United States citizens and permanent residents.

Even if only the rights of aliens were involved here, this case would nonetheless be significantly different from those cases upon which the Government relies. Assuming arguendo that Congress has the broad power to determine which group of aliens should be excluded and which should be admitted, once Congress makes those choices, individuals within a particular group cannot constitutionally be subjected to different treatment on the basis of criteria wholly unrelated to any legitimate government interest. Accord, Francis v. Immigration and Naturalization Service, _____F. 2d _____ (2 Cir., No. 74-2245, March 9, 1976).

The language of the cases cited by the Government which refers to the assertedly broad power of Congress over the admission of aliens should not be distorted out of the context of the facts of those cases[2] to strip the courts of their traditional responsibility to safeguard and secure the Constitutional rights of the parties who come before them. The concept that a whole area of law is immune from judicial review of its constitutionality is an extreme aberration which undermines the constitutional function of the Court as a co-equal branch of our tripartite government with the

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[2] An examination of those cases discloses that, dictum aside, the cases were decided on narrow grounds which are inapplicable here. In Harisiades v. Shaughnessy 342 U.S. 580 (1951), the Court merely deferred to Congressional judgment as to whether alien Communists were a threat to the national security of this country. Under the historical conditions of the time, the Court felt that Congress was reasonable in its determination that there was a threat from Communist power without and within the United States. Also, Galvan v. Press, 347 U.S. 522(1953). The Japanese Immigrant (footnote 2 cont'd next page)

(Footnote 2, cont'd.)

Case, 189 U.S. 86 (1902) determined that a law excluding paupers or persons likely to become a public charge did not abrogate a treaty with Japan. Kleindienst v. Mandel, 408 U.S. 753 (1972) held that a citizen's First Amendment rights could not compel the admission of a particular Communist alien who was otherwise excludable on the basis of a stated facially legitimate and bona fide reason. Boutilier v. Immigration and Naturalization Service 387 U.S. 118 (1967) held that the term "psychopathic personality" is not void for vagueness and includes homosexuals.

Contrary to the Government's contention, Dunn v. Immigration and Naturalization Service 499 F. 2d 856 (9 Cir., 1974) cert. den. 419 U.S. 1106 (1975), did not determine that an alien can be excluded on the basis of race. Rather, the Court determined there, as in Faustino v. Immigration and Naturalization Service 432 F. 2d 429 (2 Cir., 1970) cert. den. 401 U.S. 921 (1971), that differential treatment between aliens from the Western and Eastern Hemispheres involved foreign policy considerations and was rational. Faustino, supra and Perdido v. Immigration and Naturalization Service 420 F. 2d 1179 (5 Cir., 1969) held that it was rational to treat adult children, over twenty-one years of age, differently from minor children, under twenty-one years of age. Contrary to the Government's contention, Noel v. Chapman 508 F. 2d 1023 (2d Cir., 1975), cert. den., did not decide that discrimination on the basis of national origin is allowable. Rather, the Second Circuit Court of Appeals determined that a policy of the executive regarding the expulsion of aliens was justiciable and subject to equal protection review but held that a policy which granted stays to alien spouses of citizens but not to alien spouses of legal permanent residents was rational.

Nazareno v. Attorney General 512 F. 2d 936 (C.A.D.C., 1975) cert. den. 423 U.S. 832 (1975) and Talanoa v. Immigration and Naturalization Service 397 F. 2d 196 (9 Cir., 1968) involved questions of statutory interpretation, not a constitutional challenge to an immigration statute. Nazareno, supra, did not uphold discrimination on the basis of age, but rather held that an unmarried adopted adult did not meet the statutory definition of a son or daughter. Talanoa held that an exemption from an employment certificate for Western Hemisphere aliens was not applicable to an alien who was a citizen of the South Pacific Island of Tonga.

unique responsibility to be the ultimate interpreter of the Constitution. United States v. Nixon, 418 U.S. 683 (1974); Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803). This unique role of the Court has been well recognized by Congress itself[3]:

> It has been repeatedly held that the right to exclude or expel all aliens or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare;that this power to exclude and expel aliens, being a power affecting international relations, is vested in the political departments of the Government, and is to be regulated by treaty or by act of Congress and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution,to intervene.
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> --House Report 1365,82nd Cong., 2d Sess., p.6 (1952) (emphasis supplied).

The Government may not, by the mere assertion that this case involves the admission of aliens, erect an impenetrable barrier to this Court's determination of the merits of Plaintiffs' constitutional claims, when a careful analysis discloses that the requirements of justiciability are fully satisfied here. Cf. United States v. Nixon, supra. A determination of justiciability "does not depend on...surface inquiry,"[4] United States

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3 In any event, Congress could not, even by express act, immunize legislative or executive decisions from all constitutional review. Johnson v. Robison, 415 U.S. 361, 366-7 (1974); Weinberger v. Salfi, 422 U.S. 779 (1975).

4 Even cases involving foreign policy or the war power are not necessarily immune from judicial inquiry.
"There are sweeping statements to the effect that all questions touching foreign relations are political questions...Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Baker v. Carr, 369 U.S. 186 at pg. 211 (1962). (footnote 4 cont'd next page)

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v. Nixon, supra, 418 U.S. at 693, and "is itself a delicate exercise in constitutional interpretation," United States v. Nixon, supra, 418 U.S. at 704. The judiciary will take the unusual step of completely acceding to the judgment of the executive or the legislative branch of government only when a "discriminating inquiry into the precise facts and posture of the particular case" results in a clear finding that the resolution of the issues in the case turns on standards that defy judicial application.[5] Baker v. Carr, 369 U.S. 186, 217 (1962).

This Court has repeatedly determined the validity of statutory provisions, such as are challenged herein, which discriminate on the basis of sex and illegitimacy, and has thus clearly found such issues to be resolvable by judicially manageable standards. This case is no different. It involves no non-justiciable considerations which defy judicial resolution, such as foreign policy concerns or a clearly expressed Congressional choice to exclude or expel a certain group of aliens who are specifically and clearly perceived to pose a grave threat to the national security, e.g., Harisiades v. Shaughnessy,

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4 (cont'd.) "[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of Congressional power which can be brought within its ambit." "[E]ven the war power does not remove constitutional limitation." United States v. Robel, 389 U.S. 258, at 263-264.(1967).

5 Similarly, in the field of immigration this Court engaged in discriminating statutory and constitutional analysis, rather than apply "'the vague and illusory but often repeated formula that Congress "by occupying the field" had excluded from it all state legislation' (citation omitted)". De Canas v. Bica, ____U.S. ____, 44 U.S.L.W. 4235, 4238 n.8 (1976).

. . .

supra, or to the general welfare of the country, e.g., Boutilier v. Immigration and Naturalization Service, supra.[6]

As fully demonstrated in plaintiff's Jurisdictional Statement, the challenged classification is wholly irrational when measured against the actual Congressional purpose as evidenced by the Act's legislative history. Jurisdictional Statement, pages 12-17. Jiminez v. Weinberger, 417 U.S. 628 (1974); Weinberger v. Wiesenfeld, ____U.S. ____, 43 L.Ed. 2d 514 (1975). The Government attempts to avoid the impact of plaintiffs' argument by contending that the conceded Congressional purpose to reunite families is vitiated by the fact that individuals other than the plaintiffs and plaintiff class members are also excluded from the operative definition of "parent" and "child." The Government's argument is wholly ingenuous, however, since those other exclusions from the "parent" — "child" definition are irrelevant to the consideration of the rationality of the challenged discriminatory exclusion of unwed natural fathers and their illegitimate children.[7] The Government's position is further undermined by the analysis which led this Court to condemn the classifications challenged in Jiminez v. Weinberger, 417 U.S. 628 (1974), and Weinberger

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6 It requires no extended argument to conclude that the challenged provisions in no way involve Congress' determination of the course of this country's relations with foreign governments. It is equally self-evident that "illegitimacy" was not perceived by Congress to pose a threat to the national security or welfare, since neither illegitimate children nor their unwed fathers are totally excludable from the United States and other groups of illegitimate children and their unwed fathers are accorded the benefits of the statutory right at stake in this case. Thus, for example, illegitimate children in relation to their mothers and unwed fathers who happen to live in a country or state which allows them to legitimate their children without marrying the children's mothers are included within the statutory definition of "child" and "parent."

7 (See next page)

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v. Wiesenfeld, ____ U.S. _____, 43 L.Ed. 2d 514 (1975). In those cases this Court was not distracted from an evaluation of the primary purpose of the provisions as reflected in the legislative history merely because Congress had chosen to also deny the benefits in question to groups of persons other than the plaintiffs therein.[8]

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7 For example, the question of whether it is rational to exclude persons over twenty-one from the definition of"child" must be determined on its own merits and is wholly irrelevant to the separate question of whether it is rational to exclude from that same definition illegitimate children in relation to their fathers.

8 In Jiminez, supra, this Court determined that the primary purpose of the challenged statute was to provide support for dependents of a disabled wage earner and that it was therefore a violation of equal protection to exclude some illegitimate children from receipt of benefits. The challenged statute excluded as well other classes of individuals such as married children, children over 18 who were not full-time students, and step-children of less than a year. 42 U.S.C. §§402(d); 416(e). Similarly, the challenged statute which was invalidated in Weinberger v. Wiesenfeld, supra, for unconstitutional sex discrimination also classified persons on bases other than sex--for example, marital status and age of the child under care. 42 U.S.C.§§402(g), 416(e). Yet this Court nonetheless looked to the legislative history to determine the actual purpose of the statutory scheme.

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The plaintiffs have amply demonstrated in their Jurisdictional Statement, pages 15-19, that the asserted Congressional objective of preventing spurious claims, which was advanced in the Court below, is a wholly hypothetical and speculative Congressional purpose which cannot be invoked to sustain the constitutionality of the challenged provision. Now, for the first time, the Government, in its motion to affirm, conjures up considerations of "morality" as the purported purpose of the statutory discrimination, in light of which this Court is asked to affirm the judgment below. The short answer to the Government's new tact is that the "morality" objective is a wholly specious one which finds no support in the legislative history. Further, the speculative "morality" purpose is contradicted by the statutory scheme itself. If Congress were legislating a moralistic repugnance against unwed parents and their illegitimate offspring, it would have been expected to completely exclude all such persons in blanket fashion from this country. However, this it has no done. First, illegitimate children and their parents, including unwed fathers and their children, are not totally barred from this country under the challenged scheme.[9] Second, not all unwed parents and their illegitimate children are denied the statutory right at issue here. Unwed natural

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9 Although unwed fathers and their illegitimate children are not totally barred by law from this country by not being included within the statutory definition of"parent" and "child," they are in effect precluded from being united as a family in this country because of the extreme difficulty of satisfying the restrictive numerical quota and labor certification requirements from which a "parent" and "child" are exempted. See Jurisdictional Statement, pages 5-10.

mothers and their children, for example, are included within the definition of "parent" and "child," and their unification in this country is thus realistically made possible. Third, not even all unwed natural fathers and their illegitimate children are denied the statutory right, since it is granted, for example, to an unwed father and his child who come from a country which allows subsequent legitimation by means other than marriage to the mother of the child. Finally, even if notions of "morality" did constitute the actual purpose of the challenged classifications, this Court has held that discrimination against an illegitimate child or his parent is not constitutionally justified as a means of eradicating or punishing the "sin" of illegitimacy. Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guarantee and Liability Insurance Co., 391 U.S. 73 (1968).

Stripped of rhetoric and conjecture, the Government's position is that the challenged provisions are rational in light of "archaic and overbroad generalizations" concerning sex-and-illegitimacy linked characteristics, i.e., that illegitimate children and their natural fathers cannot constitute viable family units while a parent and a legitimate or legitimated child, a step-child, or adopted child, or an unwed natural mother and her illegitimate child invariably do constitute viable family units. Such stereotyping on the basis of sex and the status of birth plainly cannot sustain the constitutionality of the challenged discrimination. Weinberger v. Wiesenfeld, ____U.S. ____, 43 L.Ed. 2d 514 (1975); Stanton v. Stanton, ____U.S. ____, 43 L.Ed. 2d 688 (1975); Taylor v. Louisiana, ____ U.S. ____, 42 L.Ed. 2d 690 (1975);

Jiminez v. Weinberger, 417 U.S. 628 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972); Reed v. Reed, 404 U.S. 71 (1971)[10]. The discrimination here is especially pernicious because it operatively denies unwed fathers and their illegitimate children the fundamental procedural right to demonstrate the existence of a viable family unit which is merely presumed for each of the family relationships which is recognized automatically by the statute. See Jurisdictional Statement, pages 19-20, and cases cited therein. Cf. Wong Yang Sung v. McGrath, 339 U.S. 33 (1949).

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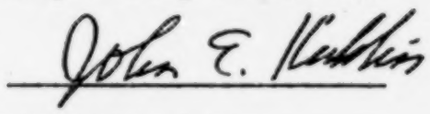
10 Weinberger v. Salfi, 422 U.S. 779 (1975), cited by the Government, is inapposite here. In Salfi, Mr. Justice Rehnquist, writing for the majority, went to great lengths to demonstrate the existence of an actually expressed and strongly held Congressional purpose to avoid the abuse of sham marriages, in light of which the nine-month-duration-of-relationship requirement of the Social Security Act was found to be rational. In contrast, the statutory provisions challenged here lack any rational basis in light of actual Congressional purpose. The total irrelevance of Salfi to the outcome here is underscored by focusing on what was not involved in that case. By the statute upheld in Salfi, Congress legislated by means of a broad prophylactic rule applied even-handedly to all categories of claimants, without picking and choosing among affected persons according to their sex or illegitimacy. It is this additional invidious element of double-barrelled sex and illegitimacy discrimination which distinguishes this case from Salfi. Indeed, had Salfi involved the imposition by Congress of the nine-month-duration-of-relationship requirement on surviving spouses of one sex and not the other, on the basis of sexual stereotyping, then the result plainly would have been different.

CONCLUSION

For the reasons stated above and in appellants' Jurisdictional Statement, appellants respectfully request that this Court deny the Government's motion to affirm and note probable jurisdiction in this case.

Dated: New York, New York
May 28, 1976

Respectfully submitted,



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----------x

AFFIDAVIT OF SERVICE BY MAIL

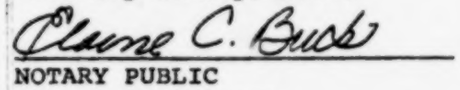
Anita Fisher Barrett, being duly sworn, deposes and says:

1. I am one of the attorneys from The Legal Aid Society for plaintiff-appellants herein.

2. Pursuant to Supreme Court Rule 33, I served a copy of Appellants' Brief in Opposition to Appellees' Motion to Affirm dated May 28, 1976, on defendants-appellees herein by depositing a copy of said Brief in a United States mail box with first class pre-paid postage addressed to attorney for defendants-appellees, David Trager, United States Attorney, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, 11201, and Solicitor General, Department of Justice, Washington, D.C., 20530, on the 28th day of May, 1976.

ANITA FISHER BARRETT

SWORN TO BEFORE ME THIS
28th Day of May, 1976.



NOTARY PUBLIC

ELAINE C. BUCK
Notary Public, State of New York
Qualified in Kings County
Term Expires March 30, 1977